(2)

Supreme Court, U.S.
FILED
JAN 3 - 2005
OFFICE OF THE CLERK

No. 04-751

IN THE

Supreme Court of the United States

H&R BLOCK, INC., H & R BLOCK TAX SERVICES, INC., H & R BLOCK EASTERN TAX SERVICES, INC., BLOCK FINANCIAL CORPORATION, H&R BLOCK SERVICES, INC., MELANIE LESTER, JASON BROWN, BOBBY HAGUE, ROBERT HECKERT, CYNTHIA LANTZ, CLARENCE E. MILLER, CARLA R. LEWIS, DEBRA RIGGLEMAN and JOHN DOE,

Petitioners,

v.

DEADRA D. CUMMINS, on her own behalf and on behalf of those similarly situated, and IVAN and LaDONNA BELL, on their own behalf and on behalf of those similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Brian A. Glasser
Counsel of Record

H. F. Salsbery
Eric B. Snyder
Deirdre H. Purdy
Bailey & Glasser, LLP
227 Capitol Street
Charleston, West Virginia 25301
(304) 345-6555

Counsel for Respondents

Balmar Legal Publishing Services, Falls Church, VA (703) 289-9000

TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF THE CASE 2

A. The Underlying Transaction 2

B. Petitioner's Mandatory Arbitration Clause 3

C. The State Court Proceedings 5

ARGUMENT 8

I. The Decision Below Comports with the Decisions of this Court. 8

II. Because the Trial Court Below Relied on State Law Principles Applicable to All Contracts, the Decision Below Does Not Justify a Grant of *Certiorari* 10

III. When the Trial Court Found the Arbitration Documents Unconscionable, No Contract Was Formed and the Issues of Enforceability and Arbitrability were Mooted. 15

IV. The Lower Court's Ruling is Supported by Independent and Adequate State Law Grounds, and if Any of Those Reasons is Supported by Law then It Would Suffice to Justify the Result 18

V. This Court Lacks Jurisdiction to Hear the Petition 21

A. At the Time of Petition, this Case had been Removed to Federal Court and was Not Subject to any State Court's Jurisdiction 21

B. The Decision Below is Not Final, but Interlocutory 22

CONCLUSION 23

TABLE OF AUTHORITIES

Cases **Page**

Allen v. Marshall Field & Co.,
93 F.R.D. 438 (M.D. 1982) 15

Allied-Bruce Terminix Cos., Inc. v. Dobson,
513 U.S. 265 (1995) 2, 9, 10

America Online v. Superior Court, 90 Cal. App.
4th 1(2001) 13

Arnold v. United Cos. Lending Corp.,
511 S.E.2d 854 (W. Va. 1998) 1, 7, 11

Art's Flower Shop v. The Chesapeake and Potomac Telephone Co. of West Virginia, 413 S.E.2d 670
(W. Va. 1991) 1, 11

AT&T Techs., Inc. v. Communications Workers of America, 475 U.S. 643 (1986) 16

Bob Schultz Motors, Inc. v. Kawasaki Motors Corp.,
U.S.A., 334 F.3d 721 (8th Cir. 2003) 17

Carbajal v. H & R Block Tax Services,
372 F.3d 903 (7th Cir. 2004) 16-17

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469 (1975) 22

Dean Witter Reynolds Inc. v. Byrd,
470 U.S. 213 (1985) 8

Deposit Guar. Nat'l Bank v. Roper,
445 U.S. 326 (1980) 15

Doctor's Assocs., Inc. v. Casarotto,
517 U.S. 681 (1996) 10

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995) 8, 9, 16

Gilman v. Wheat, First Securities, 692 A.2d 454
(Md. 1997) 13

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 14
Goode v. Goode,
396 S.E.2d 430 (W. Va. 1990) 18
Great Western Mortgage Corp. v. Peacock,
110 F.3d 222 (3d Cir. 1997) 17
Green Tree Fin. Corp. v. Bazzle,
539 U.S. 444 (2003) 16
Hill v. Ryerson & Son, Inc.,
268 S.E.2d 296 (W. Va. 1980) 12
Howsam v. Dean Witter Reynolds, Inc.,
537 U.S. 79 (2002) 16
Johnson v. Junior Pocahontas Coal Co.,
234 S.E.2d 302 (W. Va. 1977) 11
Johnson v. W. Suburban Bank,
225 F.3d 366 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001) 13
McMellon v. United States,
387 F.3d 329 (4th Cir. 2004) 21
Michigan v. Long,
463 U.S. 1032 (1983) 12
Murphy v. North American River Runners,
412 S.E.2d 504 (W. Va. 1991) 11
Musnick v. King Motor Co. of Ft. Lauderdale,
325 F.3d 1255 (11th Cir. 2003) 17
Perry v. Thomas, 482 U.S.
483 (1987) 9
Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 15
Prima Paint Corp. v. Flood & Conklin Mfg. Co.,
388 U.S. 395 (1967) 8
Randolph v. Green Tree, 244 F.3d 814 (11th Cir. 2001) 13

Reynolds v. Beneficial Nat'l Bank,
288 F.3d 277 (7th Cir. 2002) 7

Robinson v. Cabell Huntington Hosp., Inc.,
498 S.E.2d 27 (W. Va. 1997) 20

Southland Corp. v. Keating,
465 U.S. 1 (1984) 22

Snowden v. Checkpoint Check Cashing,
290 F.3d 631 (4th Cir. 2002) 13

State ex rel. Chemtall, Inc. v. Madden, __ S.E.2d __,
2004 WL 2750996 (W. Va. 2004) 12

State ex rel. Dunlap v. Berger, 567 S.E.2d 265 (W. Va.),
cert. denied, 537 U.S. 1087 (2002) 7, 11, 12, 19

Thomas v. LaRosa,
400 S.E..2d 809 (W. Va. 1990) 18

Troy Mining Corp. v. Itmann Coal Co., 346 S.E.2d 749
(W. Va. 1986) 11, 12, 15

U.S. Life Credit Corp. v. Wilson,
301 S.E.2d 169 (W. Va. 1982) 11

*Volt Information Sciences, Inc. v. Bd. Of Trustees of the
Leland Stanford Junior Univ.*,
489 U.S. 468 (1989) 8, 9

Statutes and Regulations:

9 U.S.C. § 2 ..... 9, 16

28 U.S.C. § 1257(a) 21, 22

29 U.S.C. § 216(b) 14

29 U.S.C. § 626(b) 14

W. Va. Code § 55-8-12 20

INTRODUCTION

Despite the attention-grabbing rhetoric of this Petition for *certiorari* and contentions that the decision below raises crucial questions about the reach of the Federal Arbitration Act ("FAA") and the ability of corporations to protect themselves from consumer class actions, this case is not really about either arbitration or class actions. The questions presented by Petitioners ("Block") mislead because they assume that a contract existed between Respondents and Petitioners. The trial court held otherwise, entirely on state law grounds, and Petitioners did not appeal that ruling. Instead, Petitioners raise questions here completely unrelated to the ruling below. Petitioners would have this Court reverse the state court finding that there was no contract at all, which was based on state law principles that apply to any contract. This holding relies on bona fide separate, adequate, and independent state law grounds, as is proper under this Court's well-settled interpretation of Section 2 of the FAA.

The opinion below found the arbitration agreement to be one-sided, non-mutual, and exculpatory, twice rendering it unconscionable. None of these features is unique to or inherent in arbitration. Under West Virginia's general law of contracts, unconscionability is a defense to contract formation. *Arnold v. United Companies Lending Corp.*, 511 S.E.2d 854, 860 (W. Va. 1998)(citing *Art's Flower Shop v. The Chesapeake and Potomac Telephone Co. of West Virginia*, 413 S.E.2d 670, 675 (W. Va. 1991)). Unconscionable contracts are void and unenforceable as a matter of law. *Id.* As the opinion below makes clear, any of these features would have been unconscionable under West Virginia law had they been contained in a contract that did not involve arbitration.

Block seeks a ruling that West Virginia law should be overridden by the FAA if such provisions are contained in a contract that *also* includes an arbitration provision. Nothing in the FAA permits parties to launder illegal contract terms

simply by putting them under the "arbitration" heading in a contract. Block believes that arbitration agreements occupy a higher footing than other contracts, but this Court has held exactly the opposite. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 271 (1995)(Congress intended the FAA to "place [arbitration] agreements upon the same footing as other contracts").

The opinion below merely applies state contract law as set forth in numerous opinions from the state's highest court and comports with principles stated in a large number of that court's decisions that have nothing to do with arbitration. In an attempt to dress up state law in federal garb, Petitioners misstate West Virginia contract law, the terms of the subject arbitration clause, and the basis for the trial court's holding. Once these matters are cleared up, it is indisputable that the opinion below is entirely consistent with general state law of contracts and this Court's arbitration decisions. This Court has consistently taught that arbitration clauses need not be enforced if they violate generally applicable principles of state contract law. That is what happened in this case.

The decision below is not worthy of *certiorari* and the Petition should be denied.

STATEMENT OF THE CASE

A. The Underlying Transaction

Block provides tax preparation services throughout West Virginia and offers its tax preparation clients refund anticipation loans ("RALs"). A RAL is a high interest, short term loan secured by a taxpayer's expected income tax refund. The RAL that Ms. Cummins purchased required Block to act as an intermediary or broker. Block advertised its ability to help consumers get a RAL, completed and filed the necessary Internal Revenue Service ("IRS") form, printed and completed the RAL applications for Ms. Cummins, verified Ms. Cummins' identity, transmitted the necessary information to the IRS and the RAL lender, negotiated the

deals under which all its customers would receive their RALs, and printed the check for Ms. Cummins. Discovery also revealed that Block controlled interest rates and credit criteria for the RALs. Although Block acted as an agent for its clients, they were never told that more than half the cost of these loans went to Block in an undisclosed kickback. Respondents say that arrangement violates Block's state law duties as a loan broker, agent or credit services organization.

Every year, the RAL lender, with input from Block, prints a form RAL application. Block provides the same, or substantially the same, RAL application to all of its West Virginia customers, at least on a year-by-year basis. Since 1997, those RAL agreements have contained an arbitration provision. The arbitration provisions evolved over the years, so in reality there are seven (7) separate arbitration provisions at issue in this case.[1] For purposes of this response, however, Ms. Cummins will do as Block did and address only the 2002 arbitration provision.

B. Petitioner's Mandatory Arbitration Clause

The 2002 form RAL application documents include a mandatory arbitration clause which provides:

> By signing this RAL application or the Loan Agreement (collectively the "Documents"), I hereby agree that any claim, dispute or controversy, whether pre-existing, present or future, and including constitutional, statutory, common law, regulatory, and equitable claims with HB (as defined below) in any way relating to (a) the

---

[1] The RAL documents first included an arbitration provision in the 1997 RAL application for tax year 1996. Thereafter Block modified the provision from year to year. The existence of seven different arbitration provisions in this case might, if certiorari were granted, create serious difficulties either (i) deciding the case, (ii) deciding whether to limit consideration to the provision raised in the Petition, or (iii) deciding whether to remand the case.

> Documents or a similar documents [sic] for prior years, (b) advertisements, promotions, or oral or written statements related to RALs, and/or (c) the relationships of the parties, including the validity, enforceability or scope of this Arbitration Provision or any part thereof (collectively the "Claim"), shall be resolved, upon the election of either me or HB, by binding arbitration pursuant to this Arbitration Provision[.]

Only in the arbitration clause, "HB" includes Block. Throughout the rest of RAL documents, "HB" refers only to "Household Bank," the lender.[2] The mandatory terms that limit Block's clients' rights, however, protect certain remedies for Block and Household Bank:

> Nothing in this Arbitration Provision shall be construed to prevent HB's use of offset or other contractual rights involving payment of my income tax refund or other amount on deposit with HB to pay off any RAL debts or ERO or other fees now or hereafter owed by me to HB or any other RAL lender or third party pursuant to the Documents or similar prior documents.

"ERO fees" are the fees Block (the Electronic Return Originator) charges its customers. This clause states that Block can take any actions it wants to collect anything it can

---

[2] *See* Pet. App. 18a ("As used in this Arbitration Provision, the term "HB" shall mean Household Bank, f.s.b., and H&B [sic] Block, Inc.[.]") Everywhere else in the RAL documents "HB" refers to Household Bank. *See, e.g.* Pet. App. 15a("A RAL Program Offered by Household Bank, f.s.b. ("HB") in Association with H&R Block ("ERO").) Everywhere outside the Arbitration Provision, H&R Block is referred to as "ERO" standing for "Electronic Return Originator." These altered meanings for defined terms illustrate the obfuscating legalese through which RAL clients, laypersons, were required to wade. They also raise the question, discussed below at Part V, whether Block as a mere possible third-party beneficiary to the arbitration document has any right under West Virginia law to enforce these provisions.

from Ms. Cummins on behalf of itself and numerous other entities, but Cummins must arbitrate.

The arbitration clause goes on to foreclose any possibility of anyone bringing a class action against Block:

> Unless a class has been or is certified in one or more of these lawsuits prior to the effective date of this Arbitration Provision and the certification has not been overturned, I acknowledge that by signing the Documents, I may be giving up my right to participate as a member of such class if HB decides to arbitrate such a claim. This means I may not be able to obtain financial or other benefits which may ultimately be paid to or conferred upon members of the class.

Under this provision, "[n]o class actions or joinder or consolidation of claims with other persons, are permitted without consent of the parties hereto." Pet. App. 16a.

C. The State Court Proceedings

Ms. Cummins filed this case on January 23, 2003 in the Circuit Court of Kanawha County, West Virginia, as a putative class action alleging that Block's secret profits violate its duties as agent, loan broker or credit services organization under state law. The class is limited to West Virginia consumers. Block removed the case to federal court, and that Court remanded on June 6, 2003, finding no federal jurisdiction. The First Amended Complaint, filed July 29, 2003, added Ivan and LaDonna Bell as additional putative class representatives. The Kanawha County trial court heard Block's motion to dismiss and compel arbitration on December 11, 2003. At a second hearing on March 18, 2004, the court denied Block's motions from the bench and issued a written order to that effect on June 1, 2004. Pet. App. 3a.

Block twisted the trial court's June 1 Order in the Petition for *certiorari*. In its June 1 Order, the court relied wholly on state contract law to hold that the RAL application

contains a host of non-mutual, exculpatory, unconscionable provisions that "provide[] an independent and adequate basis for revocation of . . . whatever contractual obligations the RAL documents created[.]" Pet. App. 13a. The court relied on "general contract law principles relating to the revocation or enforcement of any contract, not just one for arbitration." Pet. App. 7a. Based on decisions from the state's highest court, the Supreme Court of Appeals of West Virginia (WVSCA), the trial court found the question whether a contract or provision is unconscionable is a gateway matter and should be decided by the court. Pet. App. 8a. The trial court placed its decision in the context of the FAA and the West Virginia Consumer Credit and Protection Act ("WVCCPA"), Pet. App. 8a-9a, and then supplemented that discussion with an analysis of the provisions of the WVCCPA relating to unconscionable contract provisions. Pet. App. 9a. The court then examined West Virginia law with respect to unconscionable provisions in contracts, both contracts of adhesion and non-adhesive agreements. Pet. App. 9a-11a.

The trial court applied these state law contract principles to the provisions in the Block RAL documents. The court found the arbitration provisions to be "one-sided provisions of non-mutuality [that] preserve, almost exclusively for [Block], the rights of offset, self-help, and a judicial forum." Pet. App. 11a. Under West Virginia law, such "non-mutuality is unconscionable." *Id.* The court next found that the arbitration provisions "are exculpatory and would unconscionably impair rights that are afforded under West Virginia law, which was designed to protect the public." Pet. App. 12a.

The court extended its non-mutuality analysis to the class-action provisions, noting that counsel for Block had admitted at hearing that Block "voluntarily joined a class action from which it had already been dismissed on a motion to compel arbitration."[3] *Id.* Given the textual non-mutuality

---

[3] In that case, Block tried to settle similar claims nationwide for less than two dollars each. The Seventh Circuit, in stern voice, vacated the

and this history of use, the court found the ostensible equality claimed by Block under this provision "transparent." Pet. App. 12a. Further, the court examined the provisions limiting Block's clients' ability to pursue their claims and their state law rights. *Id.* The court also explained that Block's putative contractual rights result "in an inability of many plaintiffs to pursue their claims due to costs" and that those costs include attorney fees. *Id.* According to the court, such provisions, "substantially limit [ ] state law rights" and "in the context of this case, are therefore unconscionable under West Virginia law." Pet. App. 13a. The court also relied on Block's failure to offer any serious evidence or argument that the clause "would not effectively act as an exculpatory clause," or to draw the court's attention "to any exceptional circumstances that would suggest that the provisions are conscionable." *Id.* The court declined to determine before more discovery whether the documents were an adhesion contract. *Id.*

The court then concluded that at least two provisions of the RAL contracts "are unconscionable and violative of West Virginia state law." Pet. App. 13a. These provisions, the court held, "are unenforceable as defined by the Supreme Court of Appeals of West Virginia." *Id.* (citing *State ex. rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va.), *cert. denied*, 537 U.S. 1087 (2002); *Arnold v. United Companies Lending Corp.*, 511 S.E.2d 854 (W. Va. 1998)). The court noted that "West Virginia law, as articulated in these two cases, provides an independent and adequate basis for revocation of any contract, including whatever contractual obligations the RAL documents created between defendants and plaintiffs." *Id.* Finally, the court found the entire arbitration provision unenforceable and void. Pet. App. 14a.

Block petitioned the West Virginia Supreme Court of Appeals for a writ of prohibition (a form of discretionary,

---

settlement as unfair and remanded the case. *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277 (7th Cir. 2002)(Posner, J.).

interlocutory appeal), which the Court denied unanimously on September 2, 2004. Pet. App. 1a.

On October 22, 2004, at its hearing on Ms. Cummins' motion for class certification, the trial court granted Cummins' motion to file a Second Amended Complaint, which named as defendants two additional Block corporate subsidiaries, Block Financial Corporation and H & R Block Services, Inc. The new defendants, joined by the original defendants, removed the case to federal district court November 22, 2004. Meanwhile, the original defendants petitioned this Court for *certiorari* on December 2, 2004. At the time of the petition, there was no final judgment from which to appeal.[4]

ARGUMENT

I. The Decision Below Comports with the Decisions of this Court

The FAA does not force people to arbitrate, but enforces their agreements to do so. "[A]rbitration is simply a matter of contract between the parties[.]" *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). The FAA realizes "a congressional desire to enforce agreements into which parties had entered." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985). Federal arbitration law "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt Information Sciences, Inc. v. Bd. of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). The Act was designed "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n.12 (1967). Congress intended "courts to 'enforce [arbitration]

---

[4] Ultimately, the district court remanded with sanctions ordered *sua sponte*. *See Cummins v. H&R Block, Inc.*, Civil Action No. 2:04-1252 (S.D. W. Va. Dec. 10, 2004)(attached as Resp. App. A.)

agreements into which parties had entered,' . . . and to 'place such agreements upon the same footing as other contracts.'" *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 271 (1995)(citations omitted). These are well-established principles of federal arbitration law, which presume that parties have entered into a contract. They are principles the trial court observed in this case.

Under Section 2 of the FAA, agreements to arbitrate controversies "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). This Court has held that in determining if there are legal or equitable grounds to revoke a contract, "courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944. Similarly, "the interpretation of private contracts is ordinarily a question of state law." *Volt Info. Sciences.*, 489 U.S. at 474. "[S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). These principles, too, were followed by the trial court when it applied West Virginia contract law to hold the provision unconscionable. Such a determination was foreseen by this Court in *Allied-Bruce*, where it explained:

> In any event, § 2 gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract."

Id., 513 U.S. at 281.

This Court has identified only one exception to its rule applying state contract law to arbitration clauses. The FAA

preempts only where state law targets arbitration clauses for less favorable treatment than other types of contracts. *See, e.g., Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (FAA preempts a state statute that imposed specific disclosure requirements only on arbitration agreements); *Allied-Bruce*, 513 U.S. at 281 (FAA preempts any state policy that "would place arbitration agreements on an unequal 'footing' with other contract terms").

In examining the arbitration provision, the trial court applied rules of unconscionability grounded in state contract law. These principles are equally applicable to any contract with any subject matter, including arbitration. As discussed above, the trial court did nothing unusual when it applied the identical unconscionability principles, well-established in state law, to the arbitration clause in the case below. This Court mandates that courts follow ordinary state-law contract principles when they consider arbitration agreements, a rule the trial court followed. "In resolving this motion," the lower court stated, "this Court must apply general contract law principles relating to the revocation or enforcement of any contract, not just one for arbitration." Pet. App. 7a.

II. Because the Trial Court Below Relied on State Law Principles Applicable to All Contracts, the Decision Below Does Not Justify a Grant of *Certiorari*

As set forth in the Statement of Facts, the trial court's order in this case is rooted in the generally applicable state common law of unconscionability, as well as the provisions of the West Virginia Consumer Credit and Protection Act. Pet. App. 8a-11a This judge did nothing that courts do not do every day with the Supreme Court's blessing: apply principles of contract formation and void contracts that are unconscionable. These principles are not specific to arbitration law, but instead are consistent with an unbroken line of West Virginia cases not involving arbitration, all of which held that similar one-sided, non-mutual, and exculpatory clauses are unconscionable. In every one of these

non-arbitration cases, the court first resolved the contract formation issue of unconscionability.[5]

"'Unconscionability' is a general contract law principle, based in equity, which is deeply ingrained in both the statutory and decisional law of West Virginia." *Arnold v. United Cos. Lending Corp.*, 511 S.E.2d 854, 859 (W. Va. 1998). In *Art's Flower Shop, supra*, for example, the Court held that a contractual provision limiting the phone company's liability to twice the cost of an advertisement was unconscionable as applied to a plaintiff bringing claims for much larger compensatory and punitive damages. The West Virginia Supreme Court's holding in this non-arbitration case that such terms were "unreasonably favorable" to defendant, 413 S.E.2d at 675, is entirely consistent with the trial court's holding in the instant case. The West Virginia Supreme Court has stepped in to eliminate such non-mutuality in cases not involving arbitration. *E.g., U.S. Life Credit Corp. v. Wilson*, 301 S.E.2d 169 (W. Va. 1982) (finding unconscionable credit contract waiving a borrower's statutory right to sue if the creditor published his indebtedness).

Similarly, the West Virginia Supreme Court's rule that exculpatory clauses are unconscionable applies evenhandedly to all contracts. Syl. Pt. 1, *Dunlap, supra*. That court has applied this rule in numerous non-arbitration cases. *E.g.* Syl. Pt. 1, *Murphy v. North American River Runners*, 412 S.E.2d 504 (W. Va. 1991) (exculpatory clause releasing defendant from liability for reckless behavior is void as against public policy); *Johnson v. Junior Pocahontas Coal Co.*, 234 S.E.2d 302 (W. Va. 1977) (exculpatory clause could not insulate strip mining contractor for liability for damages to a nearby

---

[5] Petitioners agree that courts should consider challenges to whether an arbitration clause was validly agreed to. Pet. at 20, n.4. They seek, however, to distinguish such "procedural" from substantive unconscionability. West Virginia law does not recognize this distinction. *See Troy Mining Corp. v. Itman Coal Co.*, 346 S.E.2d 749, 753 (W.VA. 1986).

property); Syl. Pt. 6, *Hill v. Joseph T. Ryerson & Son, Inc.*, 268 S.E.2d 296 (W. Va. 1980). Not all contracts are found unconscionable, of course. The same Court applied the identical equitable principles to find provisions in a commercial agreement conscionable. *Troy Mining Corp. v. Itmann Coal Co.*, 346 S.E.2d 749, 753 (W. Va. 1986)

None of these cases involves an arbitration clause, and each establishes that the decision below is simply an application of generally applicable state law involving non-mutual exculpatory clauses. Because none of the cases cited by Petitioners involves West Virginia law on this topic, there can be no conflict between these authorities, except to the extent that the FAA might ever be construed to preempt generally applicable state contract law.[6]

Ignoring the holding of the trial court below, Petitioners instead attack *State ex rel. Dunlap v. Berger, supra.* Petitioners excoriate *Dunlap* as an example of West Virginia state law's "outright antagonism toward arbitration." [7] Pet. at 2. To the extent that any of the cases cited by Petitioners

---

[6] This pure state law basis for the trial court's holding, a ground that Block never appealed, itself deprives this Court of jurisdiction. The decision of the court below that there was no contract rests explicitly on bona fide separate, independent and adequate state law grounds. *Michigan v. Long*, 463 U.S. 1032 (1983).

[7] Petitioners also fear that they could be exposed to nationwide class actions if one jurisdiction "disregards" their arbitration provision. Pet. at 3. That fear is unfounded both in this case and in the state of West Virginia. The instant case involves only plaintiffs getting RALs in West Virginia. There are no multi-state claims. In addition, West Virginia recently threw up barriers to such a class action. To demonstrate typicality, the state Supreme Court required putative class action plaintiffs from seven different states to show their medical monitoring claims were based on the same legal theory. *State ex rel. Chemtall, Inc. v. Madden*, __ S.E.2d __, 2004 WL 2750996 (W. Va. 2004). Because the various states had various medical monitoring laws, or recognized no such claim, typicality could not be satisfied. The nationwide class Respondents fear would likely meet the same fate in West Virginia.

reach conclusions contrary to this result, this reflects a difference between the varying law of exculpatory clauses in different states. There is a growing body of law around the nation addressing the issue of whether contracts of adhesion may prohibit consumers from bringing their claims on a class action basis in cases that do not involve arbitration. It is clear from this body of law that entirely apart from arbitration issues, different states have reached different results on the question. *Compare America Online v. Superior Court,* 90 Cal. App. 4th 1, 8 (2001) (forum selection clause that required consumers to bring claims in Virginia, a state which does not permit class actions, held unconscionable under California law because consumers could not effectively vindicate their rights in this forum) (case not involving any arbitration clause), *with Gilman v. Wheat, First Securities,* 692 A.2d 454 (Md. 1997) (enforcing identical forum selection clause, as it was not unconscionable under Maryland law) (case not involving any arbitration clause). In *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002), a Maryland case, the Fourth Circuit followed *Gilman* in holding that a prohibition on class actions is not unconscionable. This decision is unremarkable because it simply applies Maryland contract law, which differs from the law of West Virginia where contracts that effectively amount to exculpatory clauses are not enforceable, as set forth above.

Block cites a great many cases that involve neither state law unconscionability issues, nor state law limitations on exculpatory clauses, but instead address questions of federal statutory interpretation. Decisions such as *Randolph v. Green Tree,* 244 F.3d 814 (11th Cir. 2001) and *Johnson v. W. Suburban Bank,* 225 F.3d 366 (3d Cir. 2000), *cert. denied,* 531 U.S. 1145 (2001), involve discussions of the language and legislative history of the Truth in Lending Act. These cases say nothing about what state law may or may not be with respect to exculpatory clauses.

Petitioners attack *Dunlap* as being counter to law, on the grounds that the FAA supposedly sweeps away state contract

law as it relates to the class action issue. This claim is simply incorrect. As set forth in Part II above, the FAA does not preempt generally applicable state law contract doctrines such as limitations on exculpatory clauses.

Petitioners attempt to get around this difficulty by claiming that any application of state law relating exculpatory clauses to bans on class actions would necessarily bar arbitration in all cases where a class action might be pursued, and therefore that such law is preempted by the FAA. This boot-strap argument is simply wrong on the merits, as there is nothing inherent to arbitration that bars class-wide relief. No one disputes that Petitioners could have drafted a contract that explicitly permits consumers to bring appropriate claims on a class action basis, but simply chose not to do so. No legal doctrine "forced" petitioners to draft their contract in a way that would insure that their customers could never vindicate their rights.

Petitioners also argue that *Dunlap* is incorrect because West Virginia's law of exculpatory clauses is supposedly preempted by this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). In fact, this Court's ruling in *Gilmer* that the right to bring a class action under the federal Age Discrimination in Employment Act (ADEA) might be waivable in an arbitration contract, 500 U.S. at 32, is readily distinguishable from this case. This Court's decision in *Gilmer* was based entirely on the text and legislative purpose of the ADEA, a federal law, and was in no way an interpretation of any state's contract laws with respect to exculpatory contracts.

Gilmer is also very different from this case because in *Gilmer* there was no reason to imagine that a ban on class actions would bar the plaintiff from effectively vindicating his substantive rights. The ADEA provides for greater individual relief in the form of unpaid wages, reinstatement, other equitable relief, liquidated damages, attorney fees and costs. *See* 29 U.S.C. § 626(b) (incorporating remedies available under 29 U.S.C. § 216(b)). Congress apparently was aware of

the fact that ADEA claims are very different from run-of-the-mill consumer claims, as class actions under the ADEA proceed on an "opt-in" basis and are not governed by Rule 23's opt-out provisions for mass claims. *See, e.g., Allen v. Marshall Field & Co.*, 93 F.R.D. 438, 441 (M.D. 1982). The waiver of class-wide relief in consumer cases involving consumer claims for small sums of money, such as the instant case, thus poses a far greater threat to plaintiffs' ability to enforce their rights. *See, e.g., Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985).

The crucial point Petitioners choose to overlook throughout their Petition is that the trial court below simply applied well-settled principles of West Virginia contract law to void a contract that happened to deal with arbitration. Both state and federal law require this result.

III. When the Trial Court Found the Arbitration Documents Unconscionable, No Contract Was Formed and the Issues of Enforceability and Arbitrability were Mooted

The court below held, "The issue of whether a contract or provision is unconscionable 'is an equitable principle and . . . should be made by the Court.'" Pet. App. 8a (citing Syl. Pt. 1, *Troy Mining*, 346 S.E 2d 749). Petitioners claim when it made this finding, the court "usurped the arbitrator's role by deciding the enforceability issue itself." Pet. at 19. Block asks "whether parties may also properly agree to arbitrate the validity and enforceability of an arbitration agreement that, on its face, applies to a given dispute." Pet. at 10. The answer that follows from the principles enunciated above is that the parties may agree to arbitrate these issues, but a court will uphold only a valid contract. Block seeks to make all arbitration agreements self-enforcing, so that even issues of contract formation go to an arbitrator. Such a rule would fly in the face of the plain text of Section 2 of the FAA and this Court's long-standing interpretation of that same Section. Under Section 2 of the FAA, agreements to arbitrate

controversies "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added).

The logic of Petitioners' slippery slope begins, as most flawed arguments do, with a bland principle: that parties to a contract may validly agree to arbitrate arbitrability, i.e., whether a given dispute falls within the scope of an arbitration clause. Pet. at 10 (citing *First Options*, 514 U.S. at 943; *AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986)).[8] The Court has included under arbitrability determinations questions such as whether a claim was timely filed and what kind of arbitration the parties agreed to conduct. Pet. at 21 (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003)). According to Block, "the logical next question" is "who decides whether enforcement of the arbitration agreement would be unconscionable[.]" Pet. at 21. Petitioners claim this Court should answer thus: "[O]nce a dispute is within the substantive scope of an arbitration agreement in a contract, all challenges to the enforcement of the agreement to arbitrate based on procedures, . . . fees, . . . or remedies should be addressed first to the arbitrator." Pet at 10-11(emphasis added). Through their proposed rule, Petitioners would end-run state contract formation law and the plain text of Section 2 of the FAA.

The cases cited in support of this proposed new rule are all distinguishable from the principles followed by the trial court in this case. *Carbajal v. H & R Block Tax Services*, 372 F.3d 903 (7th Cir. 2004) enforced a broad arbitration clause

---

[8] Crucially, Petitioners overlook the holding in *First Options* that "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *Id.*, 514 U.S. at 944. The only qualification is that courts should not assume the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakable[e]" evidence that they did so." *Id.* (citing *AT&T Technologies*, *supra*, at 649).

only because there was no showing that Delaware law would refuse to enforce the terms at issue. *Id.* at 906. In this case, the opposite is true. Block did not even attempt to show that its clause complied with West Virginia law. Such state-specific results are expected because the FAA does not extinguish generally applicable state law of contract formation. The rest of the cases on which Petitioners rely examine unconscionability in light of public policy and arbitration. For example, in *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A.*, 334 F.3d 721, 726-27 (8th Cir. 2003), it was the court's duty to determine validity of agreement, but the availability of remedies went to an arbitrator. Similarly, in *Musnick v. King Motor Co. of Ft. Lauderdale*, 325 F.3d 1255, 1258-62 (11th Cir. 2003), the court held the issue of fee-shifting in a Title VII case should go to arbitration. In *Great Western Mortgage Corp. v. Peacock, 110 F.3d 222*, 232 (3d Cir. 1997), the issue of inability to collect statutory punitive damages was sent to arbitration. None of these cases, except *Carbajal*, applies principles of contract law applicable to any contract, and *Carbajal* applies the law of Delaware. Instead, in each of these cases the question is whether an arbitration agreement is unconscionable because it limits remedies that would be available in the courts. That was not the issue, or even the type of issue, the court below decided.

The trial court held the arbitration provision unconscionable because the remedies were one-sided and non-mutual. The problem was not that certain remedies were provided or not provided, as in the cases Petitioners cite. The problem was that the remedies were available to one party but not the other. For that reason, the agreement was unconscionable, and so void. Pet. App. 14a. Petitioners accuse the trial court of "running roughshod" over arbitration provisions, Pet. at 23, while they trample the law of contract formation and basic principles of federalism and the FAA. If, as here, unconscionability is applied even-handedly to all contracts, including arbitration agreements, state courts must

apply it to the fundamental question of whether a contract was formed.

Petitioners' rule would make arbitrability self-fulfilling. If some piece of paper says that questions of "validity" and "enforceability," which Block takes to mean contract formation, go to an arbitrator, anyone, anywhere could be forced to arbitrate. The drafter of such a "contract" could effectively extinguish court review of the formation of any contract. Thus, we return to the starting point of this analysis. Petitioners would elevate arbitration clauses to some kind of special status. But they are not special. They are just contracts. Courts decide whether parties made a contract, and that is exactly what the trial court did here.

Under Block's proposed rule, a West Virginia court would have no power to void a local pimp's contract for prostitution services that contained an arbitration provision. An arbitrator would instead have to pass on the issue in the first instance, even though a contract for meretricious acts has long been a quintessential example of an unconscionable contract. *Goode v. Goode*, 396 S.E.2d 430, 437 (W. Va. 1990); *Thomas v. LaRosa*, 400 S.E.2d 809, 812-14 (W. Va. 1990).

IV. The Lower Court's Ruling is Supported by Independent and Adequate State Law Grounds, and if Any of Those Reasons is Supported by Law then It Would Suffice to Justify the Result

As the opinion below makes clear, the trial court found Block's arbitration clause was unconscionable for independent and sufficient reasons, having nothing to do with class actions. *See, e.g.*, Pet. App. 11a ("The arbitration provisions . . . are one-sided provisions of non-mutuality [that] preserve, almost exclusively for [Block], the rights of offset, self-help, and a judicial forum."); Pet. App. 13a ("West Virginia law . . . provides an independent and adequate basis for revocation of any contract, including whatever contractual obligations the RAL documents created[.]") Accordingly,

this Court should not grant *certiorari* in this case because the decision of the court below was correct or not in conflict with some other authority, with respect to any of the independent reasons the court below held to justify its finding.

This Court's decision on the ostensible issues raised by Petitioners would not settle the case below. Nothing in the questions presented settles the issues that would remain, all of which cut against Petitioners' position. First, the trial court declined to decide whether the arbitration provision and RAL documents were a contract of adhesion. Pet. App. 13a. There is no doubt, however, that they are. Block's consumer clients had no ability to negotiate the terms of the RAL agreement that was set before them on a take-it-or-leave-it basis, which is definitive of a contract of adhesion. On remand, the trial court would simply have to return to that issue, find this is a contract of adhesion, and apply the teachings of *Dunlap* that exculpatory provisions in such a contract are presumptively unconscionable – an additional reason for the court below to void this agreement. Although *Dunlap* involved enforcement of an arbitration clause, nothing in the court's statement of the law regarding exculpatory clauses in contracts of adhesion concerns arbitration. Syl. pt. 2, *Id.*, 567 S.E.2d at 275-76.

Second, there is a substantial question whether Block is, in fact, a party that has standing to enforce this agreement at all and thus has standing to appeal. This is another state law question. Block would have this Court believe that the RAL documents recite a contract between Block and its clients. Pet. at 4. Instead, Block's taxpayer clients signed a "loan application" between themselves and the lending bank, Household Bank or "HB." Through creative redaction and interpolation, Petitioners misrepresent the arbitration clause, replacing in their petition the term "HB" with "[petitioners]," so it appears that Block is party to this agreement. *Id.* Although Block brokered the loan, it was no party to the agreement. Block's only possible participation in the RAL contract would be as a third-party beneficiary – and that only

under the arbitration clause. By replacing "HB" with "petitioners" when quoting the Arbitration Provision, Pet. at 4, Block erases this crucial fact. Petitioner Block was not party to any contract, but at most -- possibly -- a third-party beneficiary. The Supreme Court of Appeals of West Virginia has held: "in order for a contract concerning a third party to give rise to an independent cause of action in the third party, it must have been made for the third party's sole benefit." *Robinson v. Cabell Huntington Hosp., Inc.*, 498 S.E.2d 27, 32 (W. Va. 1997) (citations omitted)(emphasis added).[9] Here only the redefinition of the term "HB" in this sole provision brings Block's interests into play. On remand, the question whether Block could enforce this Arbitration Provision would determine its rights in this action. Any decision this Court may make on the issues Petitioners raise is not determinative of further litigation on the relevant causes of action.

Even if this Court should decide the issues Petitioners invent, and decide them against Respondents, nevertheless, this case would be unresolved and return to the trial court on further basic issues of contract formation and standing, all of which rest on well-settled issues of state law contract interpretation, and none of which require Supreme Court intervention.

---

[9] Under West Virginia law:

> If a covenant or promise be made for the sole benefit of a person with whom it is not made, one with whom it is made jointly with others, such person may maintain, in his own name, any action thereon which he might maintain in case it has been made with him only, and the consideration had moved from him to the party making such covenant or promise.

W. Va. Code § 55-8-12.

V. This Court Lacks Jurisdiction to Hear the Petition.

A. At the Time of Petition, this Case had been Removed to Federal Court and was Not Subject to any State Court's Jurisdiction

On December 1, 2004, when the Petition for Certiorari was filed, the case appealed from was pending in federal court because the Petitioners consented to removal. Thus no jurisdiction existed at the time of petition. This alone warrants denial of the Petition.

Petitioners attempt to explain away the fact that at the time of petition there was no court to which this Court could issue a mandate by stating, without citation of authority, that the removal does not affect this Court's jurisdiction. *See* Pet. at 8, n.2. Once the case was removed, however, the trial court's order was no longer "final" pursuant to 28 U.S.C. § 1257(a), the statute under which Block asserted this Court's jurisdiction. To the contrary, the order was nothing more than the law of the case, which the district court, had it enjoyed jurisdiction, would have had discretion to follow or ignore. *McMellon v. United States*, 387 F.3d 329, 355 (4th Cir. 2004).

By their unexplained delay in filing here, Petitioners gave themselves a choice between removal and certiorari. They chose removal. Even if this jurisdictional defect were cured by the district court's subsequent remand, these creative procedural acrobatics are reason enough to deny the petition because if accepted, this court would have to carve a judicial exception to the 90-day jurisdictional bar for certiorari petitions. Importantly, nothing prevents this Court's ultimate review. After trial, Block could appeal again to the state supreme court and then petition this Court, should it disagree with the result.

B. The Decision Below is Not Final, but Interlocutory

Jurisdiction is also lacking because the judgment below is not final. In their jurisdictional statement Petitioners rely on *Southland Corp. v. Keating*, where this Court explained:

> Judgments of state law that finally decide a federal issue are immediately appealable when 'the party seeking review here might prevail [in the state court] on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action[.]

465 U.S. 1, 6 (1984)(citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975)). Here the trial court below did not decide a federal issue, but a matter of state contract law. Accordingly, this is not a "final judgment" for purposes of 28 U.S.C. § 1257(a). Rather, there is no federal issue, no subject matter jurisdiction, and for these reasons also the Petition should be denied.

CONCLUSION

This Court should deny *certiorari* because the trial court below properly applied state contract law, applicable to all contracts, not just to arbitration, to find an arbitration provision unconscionable and void. This was an unexceptionable application of state law consistent with the FAA, which raises no important federal questions.

Respectfully Submitted,

Brian A. Glasser
Counsel of Record
H. F. Salsbery
Eric B. Snyder
Deirdre H. Purdy
Bailey & Glasser, LLP
227 Capitol Street
Charleston, West Virginia 25301
(304) 345-6555
Counsel for Respondents

January 3, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF WEST VIRGINIA
CHARLESTON DIVISION

DEADRA D. CUMMINS, on her behalf
and on behalf of those similarly situated, and
IVAN and LaDONNA BELL, on their own
behalf and on behalf of those similarly situated

Plaintiff,

v. CIVIL ACTION NO. 2:04-1252

H&R BLOCK, INC., H&R BLOCK TAX
SERVICES, INC., H&R BLOCK EASTERN
TAX SERVICES, INC., BLOCK FINANCIAL
CORPORATION, H&R BLOCK SERVICES, INC.,
MELANIE LESTER, JASON BROWN,
BOBBY HAGUE, ROBERT HECKERT,
CYNTHIA LANTZ, CLARENCE E. MILLER,
CARLA R. LEWIS, DEBRA RIGGLEMAN and JOHN DOE

Defendants.

ORDER

Pending before the court is the plaintiffs' motion to remand this action to state court [Docket #5]. For the reasons discussed below, this motion is **GRANTED** and this action is **REMANDED** to state court.

I. Facts

On January 22, 2003, the plaintiff, Deadra R. Cummins, commenced this lawsuit in the Circuit Court of Kanawha County, West Virginia against H&R Block, Inc. (H&R Block), and individual agents of H&R Block, Melanie Lester, Jason Brown, Bobby Hague, and Robert Heckert. The complaint states that the plaintiff went to H&R Block for

income tax preparation services for the years 1998 through 2001, and that in each of those years, an H&R Block agent recommended that the plaintiff apply for a "Rapid Refund." A "Rapid Refund" a Refund Anticipation Loan (RAL) that is funded by a national bank (in this case, either Beneficial National Bank or Household Bank), and secured by the taxpayer's expected tax refund. The complaint alleges that an RAL typically carries an interest rate of between 29% and 750%. The plaintiff seeks recovery for H&R Block's alleged unlawful practice of taking secret kickbacks from the national banks as part of its Rapid Refund program.

The lawsuit alleges the following seven counts of wrongdoing by the defendants: (1) breach of fiduciary duty arising out of an agency relationship; (2) breach of fiduciary duty arising out of a confidential relationship; (3) breach of fiduciary duty arising out of Block's status as a loan broker; (4) violation of West Virginia's statute governing credit services organizations, W. Va. Code § 46A-6C-l et seq.; (5) breach of contract; (6) unjust enrichment; and (7) unfair or deceptive trade practices, in violation of W. Va. Code § 46A-6- 101. Defendant H&R Block was served on January 22, 2003 and defendant Heckert was served on January 31, 2003. It does not appear from the record that any other defendants have been served.

Defendants H&R Block and Heckert filed their first notice of removal on February 20, 2003, asserting: (1) that the case falls within this court's diversity jurisdiction due to the plaintiff's fraudulent joinder of Heckert, a non-diverse defendant; or in the alternative, (2) that the case falls within federal question jurisdiction because the National Bank Act (NBA), 12 U.S.C. §21 t seq., completely preempts the plaintiff's state law claims. The plaintiff then filed a timely motion to remand, arguing that: (1) defendant Heckert is a proper party to the suit, and that his presence in the suit destroys complete diversity, and (2) there is no legal justification for the defendants' complete preemption argument. In an order dated June 5, 2003, this court remanded

the action to state court, finding that the defendants' allegations of fraudulent joinder and complete preemption were inapplicable to the case.

On October 22, 2004, plaintiffs served a copy of their amended complaint on the defendants. The amended complaint added two additional defendants: Block Financial Corporation and H&R Block Services, Inc. On November 22, 2004, these newly added defendants filed a timely Notice of Removal. In this notice, the defendants argue that the action is removable to federal court under the provisions of 28 U.S.C. § 1441(b) because it is one that could have been properly brought under the original subject matter jurisdiction of this court, pursuant to 28 U.S.C. § 1331. This notice of removal again argues that "plaintiffs' claims are removable under the doctrine of complete preemption."

II. Discussion

There are two types of cases in which a district court has original jurisdiction - those cases raising a federal question and those cases involving diversity of citizenship. An action may be removed from state court to federal court if it is one over which the district court would have original jurisdiction. 28 U.S.C. § 1441(b) (2003). The burden of establishing federal jurisdiction is placed on the party seeking removal. *Mulcahey v. Columbia Organic Chems. Co., Inc.*, 29 F.3d 148, 151 (4th Cir. 1994). Because removal jurisdiction raises significant federalism concerns, this court must strictly construe removal jurisdiction. *Id.* If federal jurisdiction is doubtful, remand is necessary. *Id.*

A. Federal Question Jurisdiction & Complete Preemption

A federal question is raised when the plaintiff's well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiffs right to relief necessarily depends on resolution of a substantial question of federal law. *Franchise Tax Rd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 10 (1983). The presence of a federal

defense is not sufficient to make a case "arise under" federal law. *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908). The narrow exception to this rule is the doctrine of complete preemption. Under this doctrine,

> [w]hen the federal statute completely preempts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law. This claim is then removable under 28 U.S.C. § 1441(b), which authorizes any claim that "arises under" federal law to be removed to federal court.

Beneficial Nat'l Bank v. Anderson, 2003 U.S. LEXIS 4277, No. 02-306 at *6 (U.S. June 2, 2003). Until recently, the United States Supreme Court has recognized that only two federal laws are so inherently powerful that they entirely displace any state claim within their zone of influence. *See Metropolitan Life Ins. Co. v. Tayler*, 481 U.S. 58 (1987) (ERISA); *Avco Corp. v. Machinists*, 390 U.S. 557 (1968) (LMRA). However, in *Beneficial National Bank*, the Supreme Court extended the doctrine of complete preemption to the NBA, holding that the NBA also has this extraordinary preemptive power. 2003 U.S. LEXIS 4277, at *9.

B. First Notice of Removal

In their first notice of removal, the original defendants asserted that removal is appropriate in this case because the plaintiff's state law claims are, in reality, claims alleging the taking of usurious interest in violation of the NBA.[1] The

---

[1] The NBA states that "[a]ny association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located . . . ." 12 U.S.C. § 85 (2003). The NBA goes on to penalize the taking of usurious interest: "[t]he taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other

defendants' argued that the plaintiff's state law claims were completely preempted by the NBA because the RALs, the center of the plaintiff's complaint, were offered and funded by a national bank, with H&R Block only acting as an intermediary. The plaintiff, on the other hand, contended that her case does not fall within the scope of the NBA because she neither named a national bank as a defendant nor plead any claims of usury in violation of the NBA.

This court determined that defendant's arguments for removal were without merit. Specifically, this court concluded that "[t]he plaintiff has pled claims for breach of fiduciary duty, violation of West Virginia's statute governing credit services organizations, unfair trade practices, and breach of contract. None of the counts allege the offense of usury, nor do they implicate the NBA in any way." Accordingly, the court found that the doctrine of complete preemption did not apply in this case.

C. Second Notice of Removal

In the most recent notice of removal, the newly-added defendants argue that plaintiffs' claims are completely preempted by federal law because they seek to control and affect the banking operations of national and federal savings banks which are governed exclusively by federal law. Defendants support this assertion by arguing that federal savings banks (like Household) are regulated only by the Office of Thrift Supervision ("OTS") and applicable federal law, *see* 12 C.F.R. § 7.4008, while national banks (like Beneficial) are regulated only by the Comptroller of Currency and applicable federal law. *See* 12 C.F.R. § 560.2(a). Finally, defendant's notice argues that in the past 30 days, the Office of Thrift Supervision (OTS) issued a letter ruling in which it determined that the preemptive force of federal savings bank regulations applies to "agents" who assist federal banks in

---

evidence of debt carries with it, or which has been agreed to be paid thereon . . . ." Id. § 86.

their operations. In sum, the defendants' notice states that "[b]ecause the entire field of banking is *completely* preempted by federal law, Plaintiff's claims—which improperly seek to interfere with the banking operations of national and federal savings banks—are removable."

Because the court finds that defendants have confused conflict preemption, which creates a federal defense but does not provide for federal jurisdiction, and complete preemption, the court must remand this action to state court. As the Fourth Circuit noted in *Denny's Inc. v. Cake*, 364 F.3d 521 (4th Cir. 2004):

> "Complete preemption" differs from "ordinary" or "conflict" preemption. Conflict preemption arises when a defendant asserts the affirmative defense that a plaintiff's state law claim is preempted by federal law. *Sonoco Prods. Co. v. Physicians Health Plan, Inc.*, 338 F.3d 366, 370-71 (4th Cir. 2003). Normally, conflict preemption "does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court." *Id.* at 371 (internal quotation marks and citations omitted). By contrast, complete preemption exists when "Congress so completely preempts a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Id.* (internal quotation marks and citation omitted). With complete preemption, removal to federal court is possible because "the plaintiff simply has brought a mislabled federal claim, which may be asserted under some federal statute."

The *Denny's* Court further explained that "[t]he touchstone of complete preemption is whether Congress intended the federal cause of action to be the exclusive cause of action for the type of claim brought by a plaintiff." *Id*; *See also Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003) (summarizing the doctrine of complete preemption and emphasizing that complete preemption exists only where Congress has intended a federal cause of action to be the exclusive cause of action for a type of claim).

In *King v. Marriot Int'l, Inc.*, 337 F.3d 421 (4th Cir. 2003), the Fourth Circuit further explained that "a vital feature of complete preemption is the existence of a federal cause of action that replaces the preempted state cause of action. Where no discernable federal cause of action exists on a plaintiff's claim, there is no complete preemption, for in such cases, there is no federal cause of action that Congress intended to be the exclusive remedy for the alleged wrong." Thus, as many courts have noted, complete preemption arises only in "extraordinary" situations. *Ansley v. Ameriquest Mortgage Co.*, 340 F.3d 858 (9th Cir. 2003).

In the present case, the defendants have repeatedly argued that "the banking operations of national and federal savings banks are governed exclusively by federal law.... Detailed regulations issued by the 0CC and OTS make clear there is no room for state laws conceming the operations of national and federal savings banks." Assuming *arguendo* that there is conflict preemption between any state law that attempts to regulate national or federal banks and the existing federal banking law, this preemption is not sufficient to create federal "arising under" jurisdiction. Further, as this court noted in its first remand order, no bank is named as a defendant. The defendants attempt to jump this major hurdle by arguing that H&R Block is an agent of the national banks and that the plaintiff's state law claims will impermissibly regulate the national banks. The court finds the latter argument unpersuasive because the defendants have not alleged any specific effect the plaintiffs' state law claims will have on the national and federal banks. The court finds that it is unnecessary to reach the issue of whether H&R Block is an agent within the meaning of the OTS letter because it finds that complete preemption is not available as a basis for federal jurisdiction in this case. As noted above, a vital feature of complete preemption is the existence of a federal cause of action that replaces the preempted state cause of action. The defendants have alleged no federal cause of action that would preempt any of the plaintiffs seven state law causes of action.

In *Pena v. Downey Savings & Loan Assn.*, 929 F. Supp. 1308 (N.D. Ca. 1996), the District Court for the Central District of California further explained the difference between conflict and complete preemption while deciding a similar issue. In that case, the plaintiff's employment with Downey Savings and Loan (Downey) was terminated for an alleged violation of certain company policies. The plaintiff's complaint alleged that her employment relationship with Downey included an implied-in-fact contract and that Downey was required to afford her certain procedures prior to her termination. Downey removed the action to federal court arguing that Pena's state claim for breach of implied contract was preempted by federal law. Specifically, Downey invoked a defense of federal preemption based on 12 C.F.R. § 563.39(a), which requires that all employment contracts between a "savings association" and its employees be in writing and specifically approved by the association's board of directors. *Id.* at 1313. This regulation, like those tangentially at issue in the present case, was promulgated by the Office of Thrift Supervision of the Department of the Treasury and expressly governs employment contracts between federally chartered financial institutions and their employees. *Id.*

Before determining if remand was appropriate, the Pena court first noted that the "well-pleaded complaint rule dictates that 'arising under' jurisdiction exists only where the federal question is apparent on the face of the well-pleaded complaint." (citing *Franchise Tax Brd. v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983)). The court further noted that "a case may not be removed on the basis of a federal defense even if the defense is anticipated in the complaint and both parties concede that it is the only question at issue." (citing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987)). The court went on to note that "preemption of state law by a federal statute or regulation ordinarily constitutes a defense to a state law claim." (citing *Fidelity Federal Savings & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 153-54 (1982)). The court noted that complete preemption is the one

exception to the well-pleaded complaint rule and indicated that such removal jurisdiction is rare and available only when Congress has preempted an area of law so thoroughly that any complaint raising a select group of claims is necessarily raising a federal claim. *Id.* at 1312-13.

The Pena court then explained the two requirements of complete preemption. *Id* at 1314. First, there must be a federal law that supercedes state law. The court found this requirement was satisfied because "OTS regulations specifically state that they are 'preemptive of any state law purporting to address the subject of the operations of a Federal savings association.'" *Id.* at 1314. The court found, however, that the defendant had not satisfied the second requirement of complete preemption. To satisfy this requirement, Downey needed to show "that the federal law or regulation provides a substitute cause of action." *Id.* In *Pena*, as in the instant case, the defendant did not allege that any federal cause of action existed to preempt the state law causes of action alleged by the plaintiff's complaint. Instead, the defendant in *Pena* and the instant case have both alleged conflict preemption, but have not demonstrated that the extraordinary federal jurisdiction provided by complete preemption exists.

III. Attorney's Fees and Costs

The court also finds that an award of attorney's fees and costs under 28 U.S.C. § 1447(c) is appropriate in this case. Section 1447(c) provides that "an order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." Because the court **FINDS** that the defendants arguments were unwarranted under existing law, the court **AWARDS** reasonable attorney's fees and costs to the plaintiffs to compensate for their actual expenses as a result of the defendants' removal. The court **DIRECTS** the plaintiffs to submit to the court a bill for fees and costs with supporting information.

IV. Conclusion

Because the court **FINDS** that federal jurisdiction based on the doctrine of complete preemption is inapplicable in this case, the court **GRANTS** the plaintiffs' motion to remand. The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: December 9, 2003

/s/

Joseph R. Goodwin
United States District Judge